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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 404

In the Matter

- of -

DEPENDABLE MERCHANDISE CORP.,

Bankrupt.

BENJAMIN BROWNSTEIN,

Successor Trustee-Petitioner,

- vs. -

ALUMINUM RESERVE CORP., *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SAMUEL J. NACHWALTER,
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The respondents pray that the petition for a writ of certiorari be denied.

Opinions Below

The opinion herein of the Court of Appeals for the Second Circuit is reported in 243 F. 2d 82.

Questions Presented

The first two questions formulated by the petitioner are factually incomplete. To properly present the propositions they should read as follows:

1. Is payment to the attorney for a trustee in bankruptcy, pursuant to a judicially approved settlement of an action based on allegedly fraudulent transfers brought by the trustee against the respondents, payment to the trustee?

2. Is payment to a firm of attorneys whose senior partner was duly retained by the trustee, pursuant to a judicially approved settlement of an action based on allegedly fraudulent transfers, payment to the trustee?

Statutory Provisions Involved

The respondents maintain that neither General Order 44, 11 U. S. C. A. foll. Sec. 53, nor 11 U. S. C. A. Sec. 107 (c) is involved in this dispute. Respondents further maintain that these provisions have nevertheless been properly complied with.

Statement of the Case

The following additional facts are necessary to a proper discussion of the problem.

The payment of the $14,000 of the $15,000 the respondents agreed to make was the result of a settlement of an action instituted by the trustee against the respondents in the United States District Court,

Southern District of New York. The action was based on allegedly fraudulent transfers, and the trustee sought to have them declared null and void, to make respondents account, and to recover a money judgment.

A. Alan Reich was the attorney of record for the trustee in this litigation. A. Alan Reich at that time was also one of the senior partners, if not the senior partner, in the firm of Reich, Peller, Guadagno and Caine.

All the payments made by the respondents, even the one payable to A. Alan Reich alone, were received by A. Alan Reich, deposited by him in the firm account, and then misappropriated by him. The trustee knew that the payments were being made by the respondents and relied on the writing of A. Alan Reich, his attorney, that they were properly deposited in the account of the trustee. In his interim report to the Referee the Trustee acknowledged payments by Aluminum Reserve Corporation of $10,000, pursuant to the stipulation of settlement.

REASONS FOR DENYING THE WRIT

I.

There is no federal bankruptcy law question which this Court will be called upon to review.

From the inception of this controversy the attorney for the petitioner has misconstrued the basis of respondents' contention. The respondents emphatically again urge that there is no Federal Bankruptcy statute involved in the case at hand. The action instituted by the trustee against these respondents was one at law or in equity, not bankruptcy. Consequently, the relationship of the litigants was controlled by the same general principles of law.

The question is not novel to this Court. In the case of *Lowenstein v. Evans et al.*, 54 F. (2d) 481, certiorari denied in 285 U. S. 539, 52 S. Ct. 311, the distinction between the two types of cases was clearly defined. The Court of Appeals, at page 484, said:

> "* * * Suits for the recovery of fraudulent and preferential transfers of property in possession of third parties, who claim adversely, are not proceedings in bankruptcy, but are controversies at law or in equity."

Thus, if bankruptcy law did not control the litigation, how can it logically be brought into play upon its conclusion? Furthermore, why then should the relationship of attorneys be controlled by it?

Respondents have contended throughout this litigation that the law applicable to this controversy is governed by the general principles of law and equity. Under the universal rule throughout the jurisdictions of this country an attorney is authorized to receive payment of a debt or claim which he is employed to recover by suit or to collect. 3 *American Jurisprudence* 299, Sec. 69; *McCoy* v. *Barclay*, 230 App. Div. 682; *Stratton* v. *Graham*, 164 App. Div. 348; *In re Howard*, 130 F. 1004; *Shapiro, et al.* v. *Capital Bakers, Inc.*, 17 F. Supp. 3. Respondents have found no authority to the contrary, nor has petitioner cited any. Contrary to the contention of the petitioner, it is apparent that there is no Federal statute which this Court will be called upon to review.

In re Howard, 130 F. 1004, bears out respondents' contention that where an attorney represents a client in litigation he is authorized to collect the debt.

Petitioner argues that in the *Howard* case the order provided for payment to the trustee's attorney. In the instant case the Referee who made the order undoubtedly intended that the general rule apply. He later when the petition herein came on before him, in effect also retroactively approved, by his opinion, payment to the attorney for the trustee. No precedent for such limitation of authority on the part of an attorney, the Referee held, was cited by the petitioner. *Shapiro* v. *Capital Bakers, Inc.*, 17 F. Supp. 3, is the second type of case in which an attorney is authorized to receive payment. There the attorney possessed the indicia of authority to collect.

The petitioner has consistently urged upon every court in this chain of litigation the unrelated principle followed in *Honodle* v. *Stafford*, 265 N. Y. S. 430; *Berlowitz* v. *Horowitz*, 230 App. Div. 728, 293 N. Y. S. 430, and *Snider* v. *Renner*, 155 M. 352. The prohibition against payment to anyone other than the guardian ad litem in the *Honodle* case was based on the specific rule contained in Section 980-a of the New York Civil Practice Act. The *Snider* and *Berlowitz* cases followed that rule too. The *Berlowitz* case is a memorandum opinion in which the facts are not detailed, but cites the *Honodle* case as authority. It must be assumed that an infant was involved in view of the additional statement in the case that the court approved the settlement, which would have been unnecessary had all the parties been adults. Obviously, the same principle is common to these cases. They are restricted to infants and controlled by Section 980-a of the New York Civil Practice Act.

In *Helgeson* v. *Farmers Ins. Exchange*, 116 Cal. App. 2d 923, also cited by petitioner, the determination of the court was controlled by the fact that the drawer of the draft had paid it over a forged endorsement and, therefore, was required to pay again. That question is not present here. Our question concerns itself entirely with whether payment to an attorney, or his law firm, in the course of litigation is payment to his client.

On general principles of law the firm also had authority to receive payment in the settlement of this action. Attorneys may form partnerships and such a partnership is but one person in law. *Mendelsohn* v.

Equitable Life Assurance Society, 178 Misc. 132; *McFarland* v. *Crary*, 8 Gow., 253; *Warner & Post* v. *Griswold*, 8 Wend. 665; *Lockwood* v. *Dillenbeck*, 104 App. Div. 71. If one member of a law firm is retained the entire firm is retained. *Ganzer* v. *Schiffbauer*, 40 Neb. 633; *Lupton* v. *Taylor*, 39 Ind. App. 412; *Lockwood* v. *Dillenbeck*, 104 App. Div. 71, and the employer is entitled to the services of all the members of the firm. *Williams* v. *A. P. Moore*, 63 Cal. 50. Consequently, the firm of attorneys had authority to receive the funds on behalf of the trustee where the senior member of the firm was the attorney of record in the action brought by the trustee against third persons, the respondents.

The same rules apply with equal force in the bankruptcy courts. The bankruptcy rules do not prohibit a firm from acting as attorneys for a trustee. The approval of A. Alan Reich by the bankruptcy court did not obliterate the fact that he was a member of a firm, nor did it cause a legal fission which split the firm into its component members. The Bankruptcy Law (Title 11, Sec. 102, 3c) recognizes the close relationship of the members of a firm and permits law partners to share in the compensation awarded to one of them. Payment, therefore, to the firm, both under general principles of law as well as under the Bankruptcy Act, was proper.

Insofar as our defense of estoppel is concerned, here again the petitioner has not shown a solitary reason for this Court to review the question. The dearth of authority offered by the petitioner is sufficiently significant to deserve no further comment.

Finally, respondents submit that the petitioner has not shown any merit to the present application. Certainly, the petitioner has not indicated any reason for considering a review of this case under any of the provisions contemplated by Rule 19 of the Rules of this Court. All the decisions are consistently adverse to every contention of the petitioner, and nothing has been shown that remains unsettled. Under these circumstances nothing remains for this Court to review. *Magnum Import Company, Inc.* v. *Coty*, 262 U. S. 159.

CONCLUSION

Since this case does not involve federal bankruptcy questions, but generally accepted principles of law and equity, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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